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No. 58030-2-I & No. 58031-1-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Michael Miller, Vicki Ringer, and Joanne Faye Torgerson,
Appellants

v.

One Lincoln Tower LLC, et al, Respondents

APPELLANTS REPLY BRIEF

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A. The provision limiting remedies is unconscionable

1. The provision limiting remedies is procedurally unconscionable.

a. The Berg-Baker Special Rule exists and applies to consumer transactions that limit remedies.

The Berg-Baker Special Rule exists in Washington and it applies to consumer transactions that disclaim warranties and limit or exclude remedies. In 2002, the Washington Supreme Court analyzed the law regarding warranty disclaimers and provisions that limit or exclude remedies:

> Thirty years ago this court set the standard for applying warranty disclaimers in *transactions involving a noncommercial entity. (Citation omitted)..* According to the decision in *Berg,* warranty disclaimers in a contract must be both (1) explicitly negotiated and (2) set forth with particularity. *(Citation omitted).* The presumption leans against the warranty disclaimer, and the burden lies on the party seeking to include the disclaimer to prove its legality. *(Citation omitted).*[1]

Developers do not deny that Washington has created the Berg-Baker Special Rule or that it applies to consumer transactions that limit remedies; rather, they try to avoid its reach by arguing it does not apply because this case does not involve the sale of goods and

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[1] *Puget Sound Financial, LLC. v. Unisearch. Inc.*, 146 Wn.2d 428, 438, 47 P.3d 940 (2002). The *Berg* rule, reaffirmed in *Puget Sound*, has been extended to clauses limiting and excluding remedies. *American Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 223, 797 P.2d 477 (1990) (acknowledging the *Berg* rule has been extended to clauses excluding remedies); and *Puget Sound*, 146 Wn.2d at 438, f.n. 12 (using exclusionary clauses and provisions limiting remedies interchangeably).

because the Buyers were "sophisticated" because they were real estate agents that marketed the units for sale to the public at large.[2]

b. This transaction cannot escape the Berg-Baker Special Rule because it involves real property and not personal property.

The Berg-Baker Special Rule applies even though the property being sold is real property and not personal property. First, Developer's argument, in a footnote, is inconsistent with its concession that the UCC's unconscionability analysis transcends UCC cases.[3] Second, the Supreme Court, in *Puget Sound*, made clear the UCC unconscionability analysis in Berg and its progeny apply by analogy to non-UCC cases.[4] Finally, other states have applied the UCC's unconscionability analysis to transactions involving real estate.[5]

This position is supported on policy grounds as well. There is no reason to not protect a person who buys a home at least as much as a person who buys a car since homes are often a person's largest asset or property purchase they ever make. Ironically,

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[2] Resp. Brief, Pg. 21, f.n. 2 (goods vs. real estate); 21-22 and 24-25 (sophisticated parties).

[3] Resp. Brief pp 20-21

[4] *Puget Sound*, 146 Wn.2d at 440, f.n. 14.

[5] *Monetary Funding Group, Inc. v. Plucino*, 87 Conn. App. 401, 411, 867 A.2d 831 (2005) ("the doctrine of unconscionability draws heavily on its counterpart in the Uniform Commercial Code which,. Although formally limited to transactions involving personal property, furnishes a useful guide for real property transactions."); *Seabrook v. Commuter Housing Co., Inc.*, 72 Misc.2d 6, 338 N.Y.S. 2d 67 (1972) (real estate lease); and *Honolulu v. Midkiff*, 62 Haw. 411, 418, 616 P.2d 213 (1980) (commercial real estate lease).

when the Washington Supreme Court decided *Berg*, a consumer goods case involving an automobile, it borrowed law from its own prior non-goods case that protected a person who purchased a home from a developer.[6] *Berg* founds its prior non-goods case did nothing more than "apply a rule of common sense *to the kind of transaction that recurs perhaps more than a million times annually in the country - the purchase of a brand new house*...This same rationale should be applied to the purchase of a brand new automobile." Now, the same policy considerations should operate in reverse and the Berg-Baker Special Rule should protect the residential home Buyers in this case from the developer's unconscionable provision limiting remedies.

c. The transaction in this case was a consumer transaction because the term "consumer transaction" should focus on the underlying transaction and not the parties' sophistication.

Buyers suggest "consumer transaction" protection extends to any natural person that engages in a transaction where the underlying property or services are bought or used primarily for personal, family or household purposes. Developers, on the other hand, suggest the focus should be on the parties' relative sophistication. Buyers' suggestion should be adopted by this Court since it is supported by common English language usage;

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[6] *Berg v. Stromme*, 79 Wn.2d 184, 195-96, 484 P.2d 380 (1971), citing, *House v. Thornton*, 76 Wn.2d 428, 457 P.2d (1969).

other Washington statutes' usage and definitions; other states' consumer protection laws; and sound policy arguments. Developers' suggestion, on the other hand, has scant support and would create an anomaly in consumer protection.

i. Since the word "consumer" is used as an adjective modifying the noun "transaction," the proper focus is on the underlying transaction and not the purchaser's sophistication.

The term "consumer" is both an adjective and a noun. When used as an adjective, it modifies the noun that follows.[7] For instance, when it is used as an adjective in the phrase "consumer goods" it modifies the noun "goods." It, therefore, describes the goods and not the person buying the goods. That is why "consumer goods" are defined as goods that are "used or bought primarily for personal, family or household purposes."[8] Under this definition, the focus is on the goods and not the person buying the goods.

Similarly, when the term "consumer" is used as an adjective in the phrase "consumer transaction," the focus should be on the underlying transaction and not the person consummating the transaction. That is why Black's Law Dictionary correctly defines a "consumer transaction" as "a bargain or deal in which a party acquires property or services primarily for a personal, family or

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[7] Garner, *A Dictionary of Modern American Usage* (1998), Pg. 16..

[8] RCW 62A.9A-102(3).

household purpose."[9] Buyers' suggested usage comports with other statutory usage when the word "consumer" is used as an adjective that describes a transaction or other noun.[10]

ii. Putting the focus on the underlying subject matter is preferred because it is consistent with other Washington statutory definitions and other states' consumer protection laws.

Buyer's suggested usage, which focuses on the underlying transaction, is consistent with other Washington statutes and other federal and state consumer protection schemes. Washington Statutes that define "consumer," either as an adjective or a noun, focus on the underlying transaction and not the parties' sophistication.[11] Other federal and state consumer protection

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[9] Black's Law Dictionary, (8th ed. 2004).

[10] See, the Consumer Credit Protection Act, 15 U.S.C. §1602(h) ("The adjective 'consumer,' used with reference to a credit transaction, *characterizes the transaction*, as one in which the party to whom credit is offered or extended is a natural person, and the money, property or services which are the subject of the transaction are primarily for personal, family, or household purposes.:); and District of Columbia Consumer Protection Procedures, DC ST §28-3901 ("...as an adjective, 'consumer' describes anything, without exception, which is primarily for personal, household, or family use;")

[11] RCW § 16.19.010(2) (2006) ("A consumer in a lease-purchase agreement is: "a natural person who rents personal property under a lease-purchase agreement to be used primarily for personal, family, or household purposes."); RCW § 19.94.010(d) (2006) ("'Consumer package' or 'package of consumer commodity' means a commodity in package form that is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by persons, or used by persons for the purpose of personal care or in the performance of services ordinarily rendered in or about a household or in connection with personal possessions."); RCW § 63.10.020(4) (2006) ("The term 'consumer lease' means a contract of lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding twenty-five thousand dollars, primarily for personal, family, or household purposes..."); RCW § 62A.9A-102(26) (2006) ("'Consumer transaction' means a transaction in which (A) an individual incurs a

schemes that define "consumer," either as an adjective or a noun, similarly look to the underlying transaction and not the parties' sophistication.[12] All these statutes consistently define consumer transactions as transactions that involve property or services bought or used primarily for personal, family or household purposes. They do not focus on the purchaser's sophistication except to the extent some require the purchaser to be a natural person.[13] Persuasive authority from other jurisdictions is in accord,

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consumer obligation, (B) a security interest secures the obligation, and (C) the collateral is held or acquired primarily for personal, family, or household purposes."); RCW § 19.118.021(4) (2006) (A consumer for purposes of a motor vehicle warranty is, "any person who has entered into an agreement or contract for the transfer, lease, or purchase of a new motor vehicle, other than for purposes of resale or sublease,"); and Washington's Consumer Protection Act, which gives standing to any person to bring a private civil action and defines person as "natural persons, corporations, trusts, unincorporated associations and partnerships." RCW §19.86.010(2) and §19.86.090 (standing).

[12] 15 U.S.C.A. § 1602 (West 2006), see also *Fed. Deposit Insurance Corp. v. Hughes Dev. Co.*, 684 F.Supp. 616, 623 (1988), *Yordanich v. Dicks*, 89 F.Supp.2d 1308, 1310 (2000); 15 U.S.C.A. § 2301 (West 2006), see also *Louisiana National Leasing Co. v. ADF Service, Inc. et al.*, 377 So. 2d 92, 96 (1979); D.C. CODE § 28-3901 (2001); GA. CODE ANN. § 10-1-392 (West 2006); IND. CODE ANN. § 24-5-10-3 (West 2006); IND. CODE ANN. § 24-5.-0.5-2 (West 2006); KAN. STAT. ANN. § 50-624 (2006), see also *Winchester v. Lester's of Minnesota, Inc.*, 983 F.2d 992, 996 (1993); LA. REV. STAT. ANN. § 51:1402 (2006); MASS. GEN. LAWS ch. 167, § 2A (West 2006); MD. CODE ANN., COM. LAW, § 14-1303 (West 2006); N.C. GEN. STAT. ANN. § 66-312 (West 2006); N.J. STAT. ANN. § 56:11-20 (West 2006); N.Y. C.P.L.R. § 4544 (McKinney 2006); OHIO REV. CODE ANN. § 1345.01 (West 2006); OKLA. STAT. ANN. tit. 15, § 752 (West 2006); OR. REV. STAT. ANN. § 646.639 (West 2006); UTAH CODE ANN. § 13-11-3(2) (West 2006), see also *Iadanza v. Mather*, 820 F.Supp. 1371, 1376 (1993); W.VA. CODE ANN. § 46A-6-102 (West 2006); W. VA. CODE ANN. § 46A-6I-1 (West 2006); WIS. STAT. ANN. § 421.301(13) (West 2006), see also *Hartman, et. al. v. Meridian Financial Services, Inc.*, 191 F.Supp.2d 1031, 1049 (2002).

[13] *See* f.n. 11 and 12.

"[a] consumer transaction is generally defined as one involving the purchase of an item for personal, family or household purposes."[14]

Moreover, no case applying the Berg-Baker Special Rule examined the purchaser's sophistication in a transaction involving property or services that were used or bought primarily for personal, family, or household purposes. In *Berg*, for example, the plaintiff was described as an automobile purchaser. Nobody knows whether he was a doctor, lawyer or car dealer.[15] Similarly, in *Baker* the Plaintiff, Robert Baker, was simply described as a golf patron. No inquiry was made into his sophistication, education, or profession.[16]

iii. Developers' arguments are inapposite because they took Washington case law out of context.

The Developer's cite to *American Nursery* was taken out of context and the case is factually distinguishable. *American Nursery* is distinguishable because it was a purely commercial transaction.[17] It involved a transaction between a commercial entity that "decided to acquire apple trees for development of a 500-acre orchard" and "a large commercial which contracted...to grow apple trees from rootstock."[18] The opinion makes clear the Court considered the

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[14] *Louisiana Nat'l Leasing Corp. v. ADF Service, Inc.*, 377 So.2d 92, 96 (La. 1979).

[15] *Berg*, 79 Wn.2d at 85.

[16] *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971).

[17]

[18] *American Nursery*, 115 Wn.2d at and 219 and 232

transaction a "*purely* commercial transaction" and applied the *Schroeder* analysis, which modified the Berg-Baker rule to allow courts to consider the totality of the circumstances.[19] Since the Court correctly considered the totality of the circumstances, it should have considered the parties' relative sophistication.

The Supreme Court made this point explicitly clear when it later described what it did in *American* . In *Puget Sound*, the Supreme Court described what it did this way.

> In *American* ...we *confirmed the use of the two-prong Berg analysis for consumer transactions* involving warranty disclaimers *and in commercial transactions for the sale of goods where there is sufficient evidence of unfair surprise*. (citation omitted). We thus also confirmed the *Schroeder totality of the circumstances analysis for clauses excluding (or limiting) liability for consequential damages in commercial transactions for services where there is insufficient evidence of unfair surprise. (citations omitted).* Finding no indicia of unfair surprise, *this court then specifically applied the Schroeder analysis to a contract for services between commercial parties*. (Citations omitted). (Emphasis added).[20]

d. Any exception to the Berg-Baker Special Rule would threaten Washington's public policy protecting consumers because it would invite fact intensive distinctions to this limited rule.

Because the Berg-Baker Special Rule only applies to a narrow subset of consumer transactions, it can be absolute. The

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[19] *Am. Nursery*, 115 Wn.2d at 481 ("Exclusionary clauses in purely commercial transactions, *such as the one at hand*, are prima facie conscionable and the burden of establishing unconscionability is on the party attacking it.") *citing Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 262-63, 544 P.2d 20 (1975).

[20] *Puget Sound*, 146 Wn.2d at 439.

Berg-Baker Special Rule is not only limited to consumer transactions and commercial transaction involving unfair surprise, but only those where the seller tries to limit the purchaser's remedies. Because it is so limited, it can be applied to all transactions within its purview without drawing distinctions between what purchasers should be protected.

Exceptions to an absolute Berg-Baker Special Rule would be dangerous. If the Developers' arguments were accepted, then it would create both a vertical and a horizontal exception to the Berg-Baker Special Rule. Vertically, a judge or lawyer would not be protected in any consumer transaction because their education and experience would preclude protection. This exception is dangerous because if the judge or lawyer wanted to valet park their car, then they, because of their education and profession, would be bound by whatever disclaimers and limitations were printed on the claim check, no matter how onerous. The next person in line would be fully protected because he or she had a different profession.

A horizontal exception would be equally dangerous. Under the Developer's proposed exception to the Berg-Baker Special Rules, a person in a specific trade would have lesser protection than people not in that trade when he or she deals within that trade. Specifically, Developers would like this Court to create a horizontal exception for real estate agents that denies them consumer

protection under the Berg-Baker Special Rule if they want to buy a residence from a commercial builder.

There is no sound policy reason to create either a horizontal or vertical exception to the Berg-Baker Special Rule. As citizens, judges, lawyers and real estate agents have come to expect certain fundamental government protection from otherwise unfair practices when engaging in consumer transactions. That is why even the most educated and experienced people do not read the back of every claim check or valet parking receipt before deciding whether to use services or buy products as a consumer.

Finally, any exceptions to the Berg-Baker Special Rule might invite the practices they are designed to prohibit. "In consumer sales transactions, intervention is warranted to counteract the *inherent* inequality of bargaining power and the resultant inequities."[21] An exception would encourage expensive defensive discovery and litigation in consumer disputes because the inherently advantaged party could discover and litigate a person's education and experience in hopes the Berg-Baker Special Rule might not apply to that particular person. In addition, the inherently advantaged party would be encouraged to institute objectionable disclaimer and limitation practices hoping a particular purchaser who challenges the practice might not be fully protected and the

[21] *Am Nursery* 115 Wn.2d at 224

more fully protected (unsophisticated) persons might be less likely to challenge the practices either because they were naïve or due to the inherent power imbalance. It is the absolute Berg-Baker Special Rule that protects consumers and keeps inherently advantaged merchants in check.

e. Even if this was a commercial transaction, then the Berg-Baker Special Rule still applies if there was unfair surprise.

The Berg-Baker Special Rule applies to provisions limiting remedies in commercial transactions where there has been unfair surprise.[22] Evidence in this case exists to show unfair surprise. The provision limiting remedies was in the Developers' pre-printed form that was 18 pages long, 35 paragraphs, and small type[23] as well as buried in a sentence that was 107 words long.[24] The Developers explicitly pointed out what would happen if Buyers defaulted (Developers would keep the deposit as liquidated damages), but did not explicitly point out what would happen if the Buyers defaulted.[25]

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[22] See f.n. 30, *Puget Sound*, 146 Wn.2d at 439, (*American Nursery* confirmed the use of the two-prong Berg analysis for consumer transactions involving warranty disclaimers *and in commercial transactions for the sale of goods where there is sufficient evidence of unfair surprise.*")

[23] FCP 136 – 153; and FCP 244 (Leider Dep, 10:14-19)., .

[24] CP 1423, ¶21.

[25] See, FCP 137 and MCP 15.

f. Even if this was a commercial transaction not involving unfair surprise, there is still procedural unconscionability.

`Even if this transaction could somehow be considered a commercial transaction not involving unfair surprise, there was still procedural unconscionability. If the Court utilizes the totality of circumstances approach in *Schroeder*, conspicuous and negotiation are "certainly relevant."[26] It is also necessary to consider the elements of an adhesion contract, which are "(1) whether the contract is a standard form printed contract; (2) whether it was 'prepared by one party and submitted to the other on a "take it or leave it" basis; and (3) whether there was 'no true equality of bargaining power' between the parties." [27]

Not only was the provision limiting remedies not conspicuous,[28] the Developers never negotiated this provision with the Buyers *or any other purchaser.*[29] Developers were also extremely more sophisticated than Buyers. Buyers may have been real estate agents, but the Developers were extremely experienced developers that developed a retail, hotel, office tower, and luxury

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[26] *American Nursery*, 115 Wn.2d at 240, citing, *Schroeder*, 86 Wn.2d at 260.

[27] *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 103 P.3d 773 (2004), citing *Yakima County*, 122 Wn.2d at 393.

[28] See f.n. 28 -30

[29] CP 244 (Leider Dep 10:5 – 11:14)

condominium mixed use complex in Bellevue's downtown.[30] Developers had a team of lawyers, Buyers did not.[31]

3. The Provision Limiting Remedies Is Substantively Unconscionable.

   a. The provision limiting remedies is substantively unconscionable because it denied Buyers a minimum adequate remedy and a fair quantum of remedy for Developers' breach.

The provision limiting remedies in this case is substantively unconscionable because it denied Buyers a minimum adequate remedy and a fair quantum of remedy for Developers' breach. RCW 62A.2-719(2), Comment 1 directly relates provisions limiting remedies with unconscionability and states:

> ...it is of the very essence of a sales contract that at least *minimum adequate remedies* be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least *a fair quantum of remedy* for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed.

A provision limiting remedies is, therefore, unconscionable if it does not provide a party with *minimum adequate remedies* or *a fair quantum of remedy* for the other party's breach.

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[30] MCP 75-76; FCP 120-21

[31] FCP 244 (Leider Dep. 10:21 -25).

Here, the provision limiting remedies does neither. Its only remedy is for the Buyers to recover the amounts they deposited. In this case Buyer Torgerson deposited $5,000 in cash *plus a $126,800 commission assignment;*[32] and Buyers Miller and Ringer deposited $5,000 in case *plus an $11,611 commission assignment.*[33] Buyers made their deposits in 2001 and have been deprived of the use thereof for years, the Developers benefited from having a signed contract that could be used for financing and marketing purposes and the market values have increased on the units by $200,000 - $500,000.[34] The Developers admittedly repudiated the contract and have resold or will resell the units, keep the $700,000 in appreciation and the Buyers can recover nothing from Developers except the amounts they deposited.

b. The provision limiting remedies is substantively unconscionable because it gives the Developers the right to collect compensatory damages against Buyers, but does not give the Buyers the right to any legal recourse for damages against Developers

The provision limiting remedies is substantively unconscionable because it gives the Developer the right to collect compensatory damages against Buyers, but does not give the

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[32] FCP 30. The total purchase price was $1,318,000 (FCP 13), 10% equals $131,800, less the $5,000 in cash paid leaves a $126,800 commission assignment.

[33] MCP 16. The total purchase price was $332,220 (MCP 14), 5% equals $16,611, less the $5,000 in cash paid leaves an $11,611 commission assignment.

[34] FCP 255 (Smith Dep. 67:19 – 68:14).

Buyers the right to any legal recourse for damages against Developers. A provision limiting remedies "blatantly and excessively favors" one party when it allows that party "alone access to significant legal recourse."[35] Hence, the effect of limiting one party's right to receive punitive damages and not limiting the other party's right to receive punitive damages was "so one-sided and harsh that it is substantively unconscionable."[36]

The result should be no different here. Under the provision limiting remedies, the Buyers could not receive any damages from Developers if Developers breached the contract, but Developers were entitled to receive liquidated compensatory damages from Buyers if Buyers breached the contract.[37] This provision blatantly and excessively favored the Developers when it allowed the Developers alone access to significant legal recourse - compensatory damages.

c. Washington should follow Florida which has specifically considered unconscionability and found identical provisions limiting remedies unconscionable.

This Court should follow Florida's case law since it is the only persuasive authority that has previously analyzed virtually identical provisions limiting remedies in contracts for condominiums to be built for unconscionability. Contrary to Respondent's

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[35] *Id.*

[36] *Id.* at 318.

[37] *See* Default And Remedies clause, FCP 19, ¶21; and MCP 22, ¶21.

suggestion, Florida's case law does not rely upon a "mutuality of obligation" doctrine to determine unconscionability. In *Blue Lakes*[38] the appellate court did not rely on the obligations being less than mutual when it found the provision limiting remedies unconscionable. In fact, it stated Florida's law on mutuality of obligation is virtually identical to Washington's and both hold parties are free to contract and that the provisions need not be identical.[39] Despite this, the *Blue Lakes* court held that provision limiting remedies' "heads-I-win, tails-you-lose approach to defaults," which is substantively identical to the provision limiting remedies in this case, was "so rapaciously skewed as to be patently unreasonable. It subverts the contract by permitting one party to breach with impunity."[40]

d. Contrary to Developers' argument, Washington courts should consider the effect of unequal remedies when considering unconscionabilty.

Developers' statements that Washington has specifically rejected "mutuality of obligation" analysis in an unconscionability case is wrong. In fact, the Washington Supreme Court in *Zuver*

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[39] Compare Florida's law in *Blue Lakes*, "There is no question that parties to a contract may agree to limit their respective remedies and that those remedies need not be the same,") *Blue Lakes*, 464 So.2d at 709 with Washington's law in *Zuver* ("Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract's terms-not that both parties have identical requirements.") *Zuver* 153 Wn.2d at 766-67.

[40] *Blue Lakes*, 464 So.2d at 708.

specifically looked at the effect of unequal obligations and determined the *effect* was unconscionable. "Zuver, however, *does not* simply argue that the arbitration agreement here lacks mutuality...(citations omitted)...Rather, she contends that the *effect* of this provision is so one-sided and harsh that it is substantively unconscionable. We agree." (Emphasis in original)[41]

e. Developers' foreign cases are not persuasive because they do not address unconscionability and are otherwise distinguishable.

In order to be persuasive authority, cases from foreign jurisdictions must address the same issue being decided in the instant case.[42] Developers' cases do not address whether the clauses being enforced are unconscionable. Developers argue these decisions are persuasive because these states have unconscionability laws. There is nothing in these cases, however, that indicates the unconscionability issue was ever raised or considered by those courts.

i. Idaho law and *Doyle* are not persuasive because Idaho law is fundamentally different and *Doyle* does not address unconscionability.

Doyle is an Idaho contract interpretation case.[43] It never discussed whether the unambiguous clause it enforced was

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[41] *Zuver*, 153 Wn.2d at 318; See, also, *Luna v. Household Finance Corp. III*, 236 F.Supp.2d 166, 118 (W.D.Wash 2002).

[42] *Conoco Inc. v. F.E.R.C.*, 90 F.3d 536, 546 (C.A.D.C. 1996); and *Baker v. U.S.*, 613 F.2d 224,228, (D.C.Ariz. 1980).

[43]

unconscionable. In addition, Washington courts have recognized a substantive and fundamental difference between the two states in they way they enforce provisions limiting remedies and warranty disclaimers.[44]

ii. Illinois law and *O'Shield* are not persuasive because Illinois law is fundamentally different and *O-Shield* does not address unconscionability.

Similar to *Doyle*, *O'Shield* is equally unpersuasive. *O'Shield* is also a contract interpretation case that does not address unconscionabilty.[45] Moreover, according to *O'Shield*, Illinois law is also fundamentally different than Washington law since there is no inquiry into negotiation, disclosure, conspicuousness or effect.[46] Moreover, at the time *O'Shield* was decided, Illinois law required both substantive and procedural unconscionability before courts would refuse enforcement.[47]

The 2006 Illinois case Developers cite, however, is more applicable. Contrary to Developers' argument that Illinois courts do not "re-write" contracts in similar circumstances,[48] the *Razor* case,

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[44] *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn. App. 357, 365, 936 P.2d 1191 (1997).

[45] *O'Shield v. Lakeside Bank*, 335 Ill.App.3d, 834, 929, 781 N.E.2d 1114 (2002).

[46] *O'Shield v. Lakeside Bank*, 335 Ill.App.3d, 834, 929, 781 N.E.2d 1114 (2002). ("Once made and agreed upon, this remedy provision is binding on the parties and will be recognized and enforced by our courts.")

[47] *See Basselen v. General Motors Corp.*, 341 Ill. App. 3d 278, 288, 792 N.E.2d 498 (2003) (Both elements of unconscionability must be met before a contract or clause will not be enforced).

[48] Resp. Brief P. 36

although not final, finds a provision limiting remedies unconscionable when it involved a consumer transaction, was not negotiated and contained in the seller's standard preprinted form.[49]

iii. Alabama law and *Hunter* are not persuasive because Alabama law is fundamentally different and *Hunter* does not address unconscionability.

Hunter is even less persuasive than *Doyle* and *O'Shield*. The issue *Hunter* decided was whether a provision limiting remedies in a counteroffer was part of the contract.[50] *Hunter's* "mention" to good faith and fair dealing only showed the issue was neither raised not considered.[51] Finally, Developers concede Alabama's unconscionabilty law is substantively different that Washington's.[52]

iv. *Washburn* is not persuasive because it did not address unconscionability and because it is factually distinguishable.

Washburn does not address unconscionability; instead, *it* involved the rules regarding auctions.[53] To this extent it is also factually distinguishable because Washington's unconscionability

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[49] Razor v. Hyundai Motor America, --- N.E.2d ----, 2006 WL 1765427 , 12-13 (Ill. 2006).

[50] *Hunter v. Wilshire Credit Corp.*, 927 So.2d 810, 812 – 14 (Ala. 2005).

[51] *Hunter*, 927 So.2d at 813, f.n.5.

[52] Resp. Brief pp. 36 – 37.

[53] *Washburn v. Thomas*, 37 P.3d 465 , 466 – 68 (Colo. App. 2001)

laws are applied differently to auctions because auctions are designed so buyers and sellers do not negotiate the sale terms.[54]

v. *Scerbo* is not persuasive because it does not address unconscionability and the provision limiting remedies is substantially different.

Scerbo also does not discuss whether the provision limiting remedies is unconscionable.[55] It is also factually distinguishable. The provision limiting remedies in *Scerbo* applied only if the seller was *unable* to perform the contract.[56] It did not deal with a seller who was *unwilling* to perform the contract.

f. The provision limiting remedies was substantively unconscionable at the time the contract was signed.

The law is generally stated that provisions limiting remedies are to be analyzed for unconscionability at the time the contract is signed.[57] That does not mean courts do not look to the effect the contract had upon the parties when the clause was invoked. In fact, that is exactly what the Supreme Court did in *Zuver*, it looked at the *effect* the provision limiting remedies had on the parties when it was invoked.[58] Once the contract was signed, the provision limiting remedies did not provide the Buyers with a *minimum*

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[54] *See Travis v. Washington Horse Breeders Ass'n. Inc.*, 111 Wn.2d 396, 402, 759 P.2d 418 (1988).

[55] *Scerbo v. Robinson*, 63 A.D.2d 1096, 406 N.Y.S.2d 370 (1978).

[56] *See id.* at 1097.

[57] *Jeffery*, 32 Wn. App. at 543-44.

[58] *Zuver*, 153 Wn.2d at 318

adequate remedy and did not provide *a fair quantum of remedy* if the Developer breached. Moreover, the *effect* was unconscionable because the units were built and the Developers resold them for more money.

Courts have the ability to fashion an equitable remedy that will provide flexibility under the circumstances at the time the clause is being challenged. Courts can either strike the unconscionable clause or just alleviate the unconscionable results.[59] Here, this Court can just relieve Buyers from the unconscionable results by allowing them to recover the appreciation on the units that occurred while the sale was pending and their deposits were being held.

4. The provision limiting remedies failed its essential purpose.

A conscionable limitation of remedies provision is unenforceable if it fails its essential purpose.[60] A remedies provision's essential purpose is to provide "minimum adequate remedies" to both parties and provide "at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract."[61] Moreover, "when a limitation of remedy clause deprives a party of the substantive value of its bargain, it is

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[59] RCW 62A. 2-719(2), Official Comment 2

[60] *Cox*, 86 Wn. App. at 370.

[61] *Marr Enterprises, Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 955 (9th Cir. 1977), *citing* RCW 62A. 2-719(2), Official Comment 2.

ineffectual."[62] Developers argue a remedies limitation provision can only fail its essential purpose if there is a latent defect,[63] but a latent defect is only an example of when a remedies limitation provision can fail its essential purpose.[64] It is illustrative and not exhaustive.

The provision limiting remedies deprived Buyers of the substantial value of their bargain. Specifically, the Buyers, in 2001, placed an earnest money deposit in escrow to buy a condominium unit and the units were built and appreciated. The Buyers, under the bargain, were to buy the units and realize the appreciation. Despite this, the Developers took the Buyers' units and the appreciation and then resold the units to third-party purchasers for more money. They did so without providing a "minimum adequate remedy" because there is no "fair quantum of remedy" to the Buyers for the Developers' breach. The provision limiting remedies only allows the Buyers to recover their own money and prohibits them from claiming any damages whatsoever from Developers. As such, the provision limiting remedies fails its essential purpose

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[62] *Cox*, 86 Win. App. at 370.

[63] Resp. Brief p. 31

[64] See *Am. Nursery*, 115 Wn.2d at 229 where it discusses a remedy limitation provision that does not fail its essential purpose because it provided a "fair quantum of evidence."

5. The provision limiting remedies is void because it violates public policy.

    a. The provision limiting remedies violated public policy because it tended to do evil and be injurious to the public at large.

It is undisputed that a contract clause that violates public policy is unenforceable and that a contract provision violates public policy if it has a "tendency to do evil, to be against the public good, or injurious to the public."[65] Here, Developers offered unbuilt residential units to the public at large; required purchasers to put up earnest money deposits; had the ability to use the purchasers' earnest money deposits and pre-sales to obtain financing and market the remaining units; and then, when the units were eventually built, decided whether to force the purchasers to buy the units or, if housing prices went up, repudiate the contracts and resell the units to third parties for more money. These clauses have a tendency to do evil and be injurious to the public.

    b. The provision limiting remedies violated public policy because the Developers and their contracts violated the Interstate Land Sales Act.

Moreover, the Developers and their contracts violated the Interstate Land Sales Act (ILSA). David Rockwell's assertions in his declaration to the contrary were contradicted by the record at

[65] *Marshall v. Higginson*, 62 Wn. App. 212, 216, 813 P.2d 1275 (1991).

the summary judgment hearing.[66] Buyers' Opening Brief cited *Samara*, which held a condominium development that used contracts that did not allow for both specific performance and damages did not obligate the developer to construct the units within two years and was not exempt from the ILSA registration requirements.[67] Developers admitted they did not comply with the ILSA registration requirements.[68] Mr. Rockwell's legal conclusions to the contrary should not have been considered by the trial court and should not be considered by this Court.[69] Developers' testimony also contradicts Mr. Rockwell's testimony because they admitted they adjusted the contract language to provide a real remedy to new buyers and remove themselves from the registration requirement.[70] Having used contracts that did not follow HUD regulations, the Developers violated public policy.

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[66] See Resp. Brief Pg. 32.

[67] *Samara Development Corp. v. Marlow*, 556 So.2d 1097, 1099-1100 (Fla. 1990)
Fla.,1990.

[68] FCP 245 (Leider Dep. 15:5-17).

[69] King County Fire Protection Districts No. 16, No. 36, 123 Wn.2d 819, 872 P.2d 516 (1994) citing *Wash. State Phys. Inx. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony and it was error for the court to consider legal opinions expressed in affidavits); and *Parkin v. Colocousis*, 53 Wn. App. 649, 653, 769 P.2d 326 (1989) (neither the trial court nor an appellate court can consider conclusions of law contained in an affidavit).

[70] CP 245 Leider Dep, 18:5-24 and 16:19-22; and CP 254 – 55 Smith Dep. 64: 24 – 66:12.

B. The Trial Court Abused Its Discretion When It Denied Buyers' Motion to Amend.

Developers do not argue they would have been prejudiced by the amendment; rather, they argue it was untimely because they say it was first raised after the summary judgment was granted. They also argue it was futile. Neither argument is persuasive.

The motion to amend could not be denied based on timeliness. Factually, Buyers brought their motion to amend prior to the summary judgment hearing. They requested the relief in their responses to Developers' summary judgment motions.[71] Unfortunately, the trial court never addressed the request in its order.[72] Despite this, motions to amend should not be denied based on timeliness alone; rather, they should be granted if there is no prejudice to the opposing party.[73]

The amendment was also not futile. If promissory estoppel exists, then Buyers would be entitled to the benefit of the bargain, which was a new contract allowing them to buy the units at the same price and without the unconscionable remedies limitation

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[71] FCP 197, ln 9-10; 201, ln 8- 9; and 220 – 222; and MCP 192, ln 6-7; 196, ln 6-7; and 216 – 217.

[72] FCP 326 – 328; and MCP 243 - 245

[73] *Caruso v. Local Union No. 690 of Intern. Broth.*, 100 Wn.2d 343, 349, 670 P.2d 240

provision.[74] As such they were entitled to benefit of the bargain damages, not just reliance damages.[75]

C. Developers did not respond to Buyers argument that the trial court erred when it denied Buyers' request to revise the summary judgment. The relief should be granted.

D. Developers did not respond to Buyers' argument that the trial court erred in failing to enter summary judgment dismissing Developers' counterclaim for rescission based on ratification and election of remedy. The relief should be granted.

Buyers' Response To Developer's Cross-Appeal.

A. Developers are not entitled to attorney fee because no judgment was rendered against Buyers.

Developers are not entitled to attorney fees because no judgment was rendered against them. The contract provision providing for attorney fees to the prevailing party states the amounts are to be paid from "the party against whom judgment is rendered." Here, no judgment was rendered against the Buyers, Developers are not entitled to fees based on the unambiguous contract language. To the extent this clause is unambiguous, it must be construed against the Developers as the party that drafted the contract.[76] Developer's efforts to have this Court re-write the Contract to now state a party who substantially prevails against

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[74] FCP 54-55 ; MCP 56-57; and FCP 295 (46:17 – 47:3)

[75] *Farm Crop Energy v. Old Nat'l Bank of Washington*, 109 Wn.2d 923, 940, 750 P.2d 231 (1988).

[76] *Graoch Associates No. 5 Ltd. Partnership v. Titan Const.*, 126 Wn. App. 856, 867, 109 P.3d 830 (2005).

another party whether a judgment is entered against them or not should not be countenanced.

B. RCW 4.84.330 does not apply because the contract had a bi-lateral attorney fee provision.

RCW 4.84.330 applies to award fees to either party if they prevail in an action involving a contract with a unilateral fee provision. Here, the attorney fee provision is bilateral and RCW 4.84.330, therefore, does not apply.

C. The proportionality approach does not apply because there were no separate and distinct claims

The proportionality approach was designed to rectify inequities "where a party receives an affirmative judgment on only a few distinct and severable contract claims."[77] In those circumstances one party should be awarded attorney fees for the claims it prevails upon, and the other party should be awarded attorney fees for those claims it successfully defends and the awards should be offset.[78] Here, Buyers only brought one contract claim. There are no distinct and severable contract claims. The proportionality approach does not apply.

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[77] *Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 68, 975 P.2d 532 (1999).

[78] *Mike's Painting*, 95 Wn. App. at 68 – 69.

D. Developers are the breaching party and Buyers are entitled to judgment.

Consistent with the arguments expressed in Buyers' opening brief,[79] even if the provision limiting remedies is enforceable, Developers breached the contract and Buyers are entitled to a judgment for Developers' breach and they are entitled to recover their deposit amount from Developers. This is especially true since Developers did not even respond to Buyers' arguments that the trial court erred in not amending the order granting summary judgment. It would be an anomaly, indeed, to require the non-breaching party to pay attorney fees to the breaching party.

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[79] Buyers' Opening Brief pp. 36 – 40 and 44 – 48.